

ORIGINAL

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

**ORIGINAL**

3000 K STREET, NW, SUITE 300  
WASHINGTON, DC 20007-5116  
TELEPHONE (202) 424-7500  
FACSIMILE (202) 424-7645

EX PARTE OR LATE FILED

WILLIAM L. FISHMAN  
DIRECT DIAL (202) 945-6986  
WLFISHMAN@SWIDLAW.COM

NEW YORK OFFICE  
405 LEXINGTON AVENUE  
NEW YORK, NY 10174

December 21, 2000

**RECEIVED**

DEC 21 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**VIA HAND DELIVERY**

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
12th Street Lobby, TW-A325  
Washington, D.C. 20554

**NOTICE OF WRITTEN *EXPARTE* SUBMISSION**

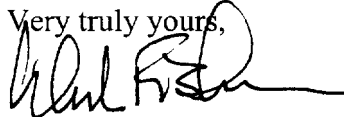
Re: *Applications of America Online, Inc. and Time Warner, Inc.  
for Transfers of Control, Docket No. 00-30/*

Dear Ms. Salas:

On behalf of RCN Telecom Services, Inc., submitted herewith for filing in the above-referenced matter pursuant to Section 1.1206(b) of the Commission's rules are an original and one copy of the attached written *ex parte* submission regarding the above-identified matter.

Any questions concerning this matter should be directed to the undersigned.

Very truly yours,



William L. Fishman

Enclosure

cc: Chairman William E. Kennard  
Commissioner Susan Ness  
Commissioner Gloria Tristani  
Commissioner Harold Furtchgott-Roth  
Commissioner Michael Powell  
Deborah Lathen  
Royce Dickens  
Linda Senecal  
John Berresford  
James Bird  
Darryl Cooper  
International Transcription Service

No. of Copies rec'd 0+1  
List A B C D E

RECEIVED

DEC 21 2000

RCN

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Scott Burnside  
Senior Vice President  
Regulatory & Government Affairs

100 Lake Street  
Dallas, TX 75202  
(570) 675-6201  
Fax (570) 675-6128

December 21, 2000

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W., TW-A325  
Washington, D.C. 20554

Re: Applications of America Online, Inc. and Time Warner, Inc. for  
Transfers of Control (CS Docket No. 00-30)

Dear Ms. Salas:

This letter responds to two recent *ex parte* submissions of AOL.<sup>1</sup> Recent press accounts indicate that the Commission hopes to resolve the pending AOL/Time Warner merger application shortly. Close to 700 submissions have been made in this docket raising a variety of issues. Among those filings are four submitted by RCN Telecom Services, Inc. ("RCN").<sup>2</sup> Although mindful of the enormous burden the Commission faces in disposing of so many filings, particularly in view of the novelty and importance of the issues presented, I nevertheless wish to update and briefly summarize RCN's position on this matter.

The AOL/Time Warner application is perhaps the most important the Commission has addressed in decades, conceivably even the most important merger on which it has ever been asked to rule. The combination of the enormous economic and cultural resources of two dominant companies – each in its own realm – poses issues of the most profound public importance. The applicants themselves recognize the importance of the merger:

The planned merger of Time Warner and America Online is a development of global importance, universally recognized as the start of a new era in global media. AOL Time Warner will be the

---

<sup>1</sup> Letters from Wiley, Rein & Fielding dated December 13, 2000, and December 19, 2000.

<sup>2</sup> See RCN's Petition to Condition Merger filed April 26, 2000, Reply Comments filed May 11, 2000, Response of RCN Telecom Services, Inc. to *Ex Parte* filings filed August 11, 2000, a letter from RCN's Chief Executive Officer, David McCourt, filed September 20, 2000, and a letter concerning possible premature assumption of control dated December 15, 2000.

first company fully prepared to compete in the borderless world of digital interactivity.<sup>3</sup>

In this light the Commission must proceed with great care to assure that its decision gives careful attention to the numerous public policy issues posed by the application. Nor does the recent conditional approval of the merger on antitrust grounds by the Federal Trade Commission (subject to public comment on a proposed Consent Decree)<sup>4</sup> diminish the importance of this Commission's responsibility to make an independent public interest finding under the Communications Act. RCN does not quarrel with the FTC's decision but notes that the mandate enjoyed by this Commission is substantially broader than that under which the FTC operates. Accordingly, the FTC's findings and proposed conditions form the starting point for this Commission's own review of the questions posed by the Communications Act.

In its prior filings, RCN has raised the following matters:

- As the nation's largest cable overbuilder and a leading ISP, RCN is deeply concerned that the merger of AOL and Time Warner will deprive RCN of nondiscriminatory access to the enormous body of content owned by Time Warner. Indeed, Time Warner has already stated an intent to limit access to some of its internet and interactive television content to AOL subscribers.<sup>5</sup> While Congress has addressed the subject of access to programming in section 628 of the Act, the issue is presented in the present proceeding in the much broader context of an overall public interest judgment which the Commission must address and resolve. Nothing that the applicants or any other party have put before the Commission in the course of this proceeding has allayed RCN's deep concern that the merger of these two giant entities would encourage and permit them to use their economic resources and structural uniqueness to attempt to foreclose competition by denying cable overbuilders and competitive ISPs full access to Time Warner programming, related interactive features, and web content. RCN strongly urges the Commission to impose a program access

---

<sup>3</sup> Time Warner 1999 Annual Report, at 7.

<sup>4</sup> See *America Online, Inc. and Time Warner, Inc.*, File No. 001 0105, Agreement Containing Consent Orders, and Decision and Order, Docket No. C-3989, adopted December 14, 2000.

<sup>5</sup> March 15, 2000, Time Warner filing with London International Stock Exchange, available at [www.FreeEdgar.com](http://www.FreeEdgar.com).

obligation on the merged entity, if it is otherwise disposed to grant the merger.<sup>6</sup> Significantly, while a program access condition was not imposed by the FTC, one of the Commissioners recognized that the issue is significant.<sup>7</sup>

- As one of the largest ISPs, if RCN does not have fair and reasonable access to a broadly useful Instant Messaging architecture, its future is gravely threatened. The docket is full of pleadings both from other ISPs and from the applicants concerning these issues and there is little that RCN can add at this point other than to reiterate, as other ISPs have done, that IM is one of the most important and dynamic sectors of the Internet and that AOL, which currently dominates the IM sector by wide margins, has done little to advance interoperability and much to retard that objective, in order to retain its own dominance.<sup>8</sup> That other ISPs are growing, even growing rapidly, does not in any way undercut this conclusion since growth rates from a small share of the market are always more dramatic than when an entity is already a substantial player. It is crucial for the development of a meaningfully competitive internet that all competitors have access to an interoperable IM architecture. Unless the FCC imposes such a condition on the merged entity it will be years, if ever, before the applicants address the issue seriously.
- Only last week the Washington Post reported that a senior AOL official had begun the process of knitting together AOL and Time Warner. In light of the well-known limitations on premature transfer of control imposed by section 310(d) of the Communications Act, RCN asked the Commission to explore whether a premature transfer of control has occurred.<sup>9</sup> The Commission should require the applicants to demonstrate that no such unlawful activity has taken place before it grants the merger. Alternatively, if such premature control has

---

<sup>6</sup> See App. C to RCN's Petition to Condition Merger which sets out the specific condition recommended by RCN.

<sup>7</sup> In his concurring Statement Commissioner Thompson noted that he was "concerned that the Commission's open access relief might not preclude the possibility of harm from the merged entity's control of AOL and Time Warner content along with the Time Warner cable systems."

<sup>8</sup> See the Letter of David McCourt, Chief Executive Officer of RCN, to Chairman Kennard, dated September 20, 2000.

<sup>9</sup> See RCN *ex parte* letter of December 15, 2000.

been asserted, the Commission must impose an appropriate forfeiture to preserve the integrity of its processes.

One of the themes that has pervaded the conflicting comments in this docket is the extent to which the Commission should interfere with the normal functions of a free market. The applicants argue that the internet is a dramatic example of the power of free markets to provide the public with goods and services and that government interference in this uniquely free market arena should be avoided if at all possible. RCN favors government intervention in free markets no more than AOL and Time Warner but it recognizes that the circumstances posed by this unique merger require some government intervention to assure that markets remain free. When it suited AOL's corporate purpose to seek government intervention, it of course did so. Indeed, it did so loudly, widely, and aggressively.

Even though AOL itself has found a new "government hands-off" religion now that it hopes to enter Time Warner's ambit, many of the internet's ISPs continue to think AOL had it right the first time: some degree of government intrusion is necessary -- at least in the current circumstances -- to protect free markets from undue concentrations of power. Consequently, while in principle RCN opposes government mandated open access, it supports such a requirement for the merged AOL/Time Warner entity given its likely overwhelming dominance of the internet/ISP/broadband marketplace for the foreseeable future. Accordingly, if the Commission concludes that the merger serves the public interest, RCN suggests that its approval be conditioned on some form of mandatory open access. The conditions imposed by the FTC appear to be reasonable, and RCN urges the Commission to adopt them as its own. Given the speed with which internet-based activities can evolve, we suggest that these conditions be revisited by the Commission after three years. If it then appears that the conditions are no longer necessary, they can be terminated, or reformulated in whatever way then best suits the continued development of a competitive ISP industry.

We recognize that having both the FTC and the FCC impose identical conditions on the merger in respect to ISP access to Time Warner's cables involves some duplication. But precisely because each agency has its own statutory mandate and they are not congruent, it is important that neither be governed by the other's legal obligations or limitations. We would assume that a high degree of coordination will exist between the two agencies, but each agency should preserve its own autonomy so that it can take whatever steps it alone deems necessary or appropriate to monitor evolving circumstances and to act, if it believes its conditions are not being properly implemented.

Indeed, the Commission has long recognized that its public interest responsibilities extend well beyond those assigned to antitrust enforcers. Its assessment of mergers requires it to undertake a public interest evaluation which is "distinct from, and broader than, the competitive

analyses conducted by antitrust authorities."<sup>10</sup> As an expert agency, the Commission is obligated to apply its special knowledge of the communications industry, an obligation the courts have affirmed on many occasions.<sup>11</sup> In performing this task the Commission must take account of potential future competitive developments.<sup>12</sup> And the Commission has full power to impose appropriate conditions to remedy perceived public interest problems.<sup>13</sup>

These considerations are of continuing relevance because there are two remaining issues which the FTC has not addressed. As noted above, RCN has urged the Commission to adopt a procompetitive program access condition. Although FTC Commissioner Thompson alluded to concern about that issue in his concurrence, the FTC did not otherwise address the matter, undoubtedly because it wanted to preserve the open access relief it had already negotiated. It is therefore in the FCC's hands to take whatever action it believes its broad public interest obligations dictate. As RCN demonstrated in its initial filings in this matter, Time Warner's dominant status in the programming marketplace, when combined with AOL's dominance in the internet world and the increasing convergence of these markets through interactive TV and otherwise, requires that the merged entity be required to avoid discrimination in making its programming available to its cable and ISP competitors such as RCN.

Similarly, the important issues posed by AOL's recalcitrance in the area of Instant Messaging ("IM") were not addressed in any way by the FTC. As RCN noted in its letter of September 15, 2000,<sup>14</sup> it is crucial that any approval of the AOL/Time Warner merger be conditioned on IM's broad and nondiscriminatory availability to the general public. In light of AOL's track record of delay the Commission must, prior to approval of the merger, compel AOL to work with other industry members to develop an interoperability protocol for IM. Numerous subsequent filings have reinforced the importance of IM.<sup>15</sup> AOL's consistent refusal to bring an interoperability standard to market in the hope that its existing dominance will assure that other

---

<sup>10</sup> *In the Matter of Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control*, 13 FCC Rcd. 18025, ¶ 12 (1998).

<sup>11</sup> *See, e.g., U.S. v. FCC*, 652 F.2d 72, 81-2 (D.C. Cir. 1980) (En Banc).

<sup>12</sup> *MCI-WorldCom Merger* at ¶ 14.

<sup>13</sup> *GTE Services Corp. v. FCC*, 782 F. 2d 263, 268 (D.C. Cir. 1986).

<sup>14</sup> Filed with the Commission on September 20, 2000.

<sup>15</sup> *See, e.g.,* letter of Covington & Burling, dated December 15, 2000, on behalf of Microsoft emphasizing the need for the Commission to require AOL to publish its IM protocol and to work toward a common protocol for server-to-server interoperability among IM providers.

Magalie Roman Salas  
December 21, 2000  
Page 6

providers remain of secondary or tertiary importance in the IM marketplace, must not be allowed to continue. Nor would an FCC condition imposing an interoperability condition be a reversal of FCC policy against regulation of the Internet, as claimed by AOL or a "picking of 'winners and losers.'" <sup>16</sup> On the contrary, failure to act would virtually guarantee that AOL would be the winner. An interoperability condition would facilitate – indeed compel – private sector IM providers to develop a standard which is acceptable to the industry as a whole, so that a winner could be selected by the marketplace. This is not only well within the FCC's broad public interest mandate, but is an approach fully consistent with that advocated by AOL at a time when it was aggressively seeking the imposition of open access by myriad regulators. <sup>17</sup>

Accordingly, RCN respectfully urges the Commission, if it concludes the merger is otherwise in the public interest, to impose programming access and IM interoperability conditions and to investigate whether a premature transfer of control may have occurred.

Very truly yours,



Scott Burnside

cc: Chairman William E. Kennard  
Commissioner Susan Ness  
Commissioner Gloria Tristani  
Commissioner Harold Furtchgott-Roth  
Commissioner Michael Powell  
Deborah Lathen  
Royce Dickens  
Linda Senecal  
John Berresford  
James Bird  
Darryl Cooper  
International Transcription Service

---

<sup>16</sup> Letter of October 19 at 4; letter of December 5, at 4.

<sup>17</sup> See, e.g., Petition for Special Relief filed by the City of Hawthorne, *et al* on September 28, 2000, at 4-5 and 14-15.